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Teaching Free Speech from an Incomplete Fossil Record

Michael Kent Curtis

TEACHING FREE SPEECH FROM AN INCOMPLETE FOSSIL RECORD

by

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I. INTRODUCTION

The second part of this symposium has been devoted to how we teach the Constitution. It has emphasized what gets left out. The reader will see a pattern. Paul Finkelman is a leading scholar on the law of slavery and the Constitution. Paul thinks – and I believe he is correct – that the immense influence of slavery on American constitutional law is too often neglected in our constitutional law courses. James Wilson has studied how political philosophers – Aristotle, Rousseau, James Harrington, and others – have understood the distribution of wealth as a central factor affecting how the constitution of a nation actually works. Jim thinks that this important issue has been ignored in most constitutional law courses, and I think he is also right. I have devoted almost ten years to studying free speech struggles from 1798 to 1868 – how they shaped both our understanding of free speech and how they shaped section one of the Fourteenth Amendment as a free speech guarantee. I see that as a crucial part of the story that often gets left out. It is easy to dismiss my view as self-serving because, of course, it is.

Even if the critiques have merit, it does not necessarily follow that casebooks and courses should change. In a world of limited time and space, every addition requires a subtraction. Whether, on balance, change would be positive is something each teacher must judge.

The University of Akron School of Law is an appropriate place for a discussion of lost storiesthe stories that get lost in the teaching of constitutional law, for example, that of J. John A. Bingham, the main author of the Fourteenth Aamendment's great first section. Bingham is an unsung American hero, the single person most responsible for the great protections of section one of the Fourteenth Amendment – protections against state abridgment of due process, equal protection, and privileges or immunities of citizens of the United States, but few know who he is.

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Dean Richard Aynes is the nation's leading expert on John A. Bingham.[1]

Today, I want to discuss another neglected part of the story of the Constitution, one that is intimately related to John Bingham and the Fourteenth Amendment as a free speech guarantee.

When my son, Matthew, was about three years old, he became fascinated by dinosaurs. I am not sure why very small boys are so interested in huge extinct beasts. Perhaps, it is this: "I am small, but you are extinct." Perhaps somehow they feel they share the dinosaur's power. Perhaps, it is simply awe. At any rate, we made many trips to the Greensboro Natural Science Center where Matthew never tired of inspecting a life-sized model of a Tyrannosaurus Rex. In the gift shop we could, and did, buy scale model dinosaurs that were supposedly anatomically correct.

Of course, I knew that the scientists who gave us re-creations of the dinosaurs had never seen one. But we gave little thought to how they arrived at their reconstructions. We tend to accept the world presented to us by the experts. The experts, of course, are sometimes mistaken.

At least one recent reconstruction has proved to be a mistake, a composite arrived at by mistakenly combining the bones of two different species. The lead sentence in a *USA Today* story announced that "The 'missing link' dinosaur-bird featured by *National Geographic* magazine in November is a fake."[2]

II. EXCAVATING FREE SPEECH HISTORY

For almost ten years, I have been excavating selected episodes in free speech history, mostly episodes before and during the Civil War. My reconstructions appear in the book, *Free Speech, The People's Darling Privilege: Struggles for Freedom of Expression in American History*.[3] The book is a series of interlocking stories about some major free speech controversies

[1] *See generally* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993); Richard L. Aynes, *The Bill of Rights, the Fourteenth Amendment, and the Seven Deadly Sins of Legal Scholarship*, 8 WM. & MARY BILL RTS. J. 405 (2000) (reviewing AKHIL AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998)).

[2] Tim Friend, *Dinosaur-bird Link Smashed in Fossil Flap*, USA TODAY, Jan. 25, 2000, at 1D.

[3] MICHAEL KENT CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE: STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000) [hereinafter CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE].

in American history from 1798 to 1868. It also has a chapter that looks at the modern fate of the early theories that were urged to justify suppressing speech. This enterprise and my earlier work on the Fourteenth Amendment and the Bill of Rights have led me to think about the perils and joys of reconstructing the past – and about incomplete fossil records.[4] My excavations have also led me to think about how we teach constitutional law and what is often left out.

III. CASEBOOKS – WHAT THEY ARE FOR AND HOW WE MIGHT MISUSE THEM

Before I tell you a bit about these controversies, I want to discuss the picture of the historic free speech animal that might be inferred by readers of the constitutional law casebooks that I studied in the 1960s. The stories I tell about the background of the Fourteenth Amendment as a free speech guarantee were not reported in the casebooks I studied as a law student and, though things are improving, to a significant extent that is still so today – even in books devoted only to the First Amendment.[5] This strikes me as a major omission, since it is the Fourteenth

[4] Of course, I stand on the shoulders of fine work by historians. What I hope my excavations have added is a new appreciation of some popular free speech ideas before and during the Civil War as they appear in these controversies. My point about the incomplete free speech record in casebooks has been made by David Rabban. *See generally* DAVID RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997).

[5] For constitutional law casebooks that have very little or no background on free speech battles from 1835 to 1866 and their relation to the Fourteenth Amendment, see, for example, NORMAN REDLICH, ET AL., CONSTITUTIONAL LAW (3d ed. 1996); JAMES A. BARRON, ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY (5th ed. 1996). The 1996 edition of STEVEN H. SHIFFRIN & JESSE H. CHOPER, THE FIRST AMENDMENT: CASES, COMMENTS, QUESTIONS (1996) also begins with World War I cases. *But see* DANIEL A. FARBER, ET AL., CONSTITUTIONAL LAW THEMES FOR THE CONSTITUTION'S 3RD CENTURY 408-10, 577-78 (2d ed. 1998) (presenting the incorporation debate surrounding the Fourteenth Amendment and discussing the Sedition Act as an introduction to the treatment of illegal advocacy under the First Amendment).

ARNOLD LOEWY, THE FIRST AMENDMENT, CASES AND MATERIALS (1999) begins with Abrams v. United States, 250 U.S. 616 (1919). GEOFFREY R. STONE, ET AL., THE FIRST AMENDMENT 3-8 (1999) devotes five pages to free speech history with a discussion of the English background, the controversy over whether the First Amendment was designed to change English law, a good, brief discussion of the Sedition Act, and a paragraph citing sources that allow the reader to pursue the story from 1798 to 1917, which mentions the effort to suppress anti-slavery literature and cites several articles and a book on the subject. It does not discuss the relation of the attempts to suppress anti-slavery and Republican speech to section one of the Fourteenth Amendment, but several of the sources cited do so. The book also contains brief biographical sketches of leading justices.

KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 2-4 (1999), devotes a little over two pages to First Amendment history, including a discussion of the English law of prior restraints and seditious libel, the issue of whether the First Amendment changed English law, and the Sedition Act of 1798. It devotes a single paragraph (twelve lines) to later free speech history between the Sedition Act and World War I, mentioning efforts to suppress abolitionist publications and free speech controversies during the Civil War--and citing one source on each. It does not discuss the suppression of Republican speech in the South before the Civil War or the relation of antebellum free speech controversies to the Fourteenth Amendment. The paragraph on free speech history also cities the celebrated work of David Rabban on post Civil War and pre-World War I free speech controversies.

Amendment that requires the states to obey the guarantees of freedom of speech, press, petition, assembly, and religion.

To the extent casebooks are designed to teach the current law through cases, it is not quite fair to criticize them for an endeavor that most do not undertake. Today, some constitutional law and free speech casebooks include more free speech history than has been customary in the past, though most leave out the history from 1830 to 1868, or touch on it very briefly.[6]

There are good reasons for the omission. Until recently, constitutional scholars have devoted little if any attention to the subject. Historians have paid more attention and have produced some very fine studies to which I am indebted, but generally these have been studies of particular events that did not seek to place the events in the larger matrix of American constitutional law.[7] Typically, historians have not considered the relation of pre-Civil War free

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The Sullivan & Gunther index contains no mention of incorporation of the Bill of Rights as a limit on the states and Adamson v. California, 332 U.S. 46 (1947), is not included in the table of cases. The text does however include Gitlow v. New York, 268 U.S. 652 (1925) with its assumption "for present purposes" that " freedom of speech and press . . . are protected by the due process clause, and the text notes in a footnote, that the "dictum was the Court's first indication that First Amendment guarantees are 'incorporated' in the 14th Amendment." SULLIVAN & GUNTHER, *supra*, at 31.

WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT: CASES AND MATERIALS 16-24, 58-73 (1995) does by far the best job on the Fourteenth Amendment and free speech. It contains an extensive discussion of early free speech history in its notes, though it does not specifically discuss the suppression of anti-slavery and Republican speech before the Civil War. The book contains a detailed discussion of the relation of the Fourteenth Amendment to free speech and press guarantees and some excerpts from the framing of the amendment. It cites scholarly works on all sides of the incorporation issue. Supplements to First Amendment casebooks show increasing attention to free speech history. For an extensive free speech history, see WILLIAM COHEN & JONATHAN VARAT, CONSTITUTIONAL LAW CASES AND MATERIALS (10th ed. 1997). The book devotes a paragraph to the controversy over anti-slavery speech in the 1830s, but does not directly discuss later suppression of Republican speech or relate the issue to section one of the Fourteenth Amendment.

[6] *See supra* note 5.

[7] The Sedition Act has produced substantial scholarship. *See, e.g.*, JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1966); LEONARD W. LEVY, THE EMERGENCE OF A FREE PRESS (1985); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 823 (1985). For the important contributions by ZECHARIAH CHAFEE, JR., see ZECHARIAH CHAREE, JR., FREE SPEECH IN THE UNITED STATES, ch. 1 (1941). For free speech controversies after the Sedition Act, see for example, CLEMENT EATON, THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH (1964) (1940) (focusing on events in the Southern states); RUSSELL B. NYE, FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY 1830-1860 (1972); W. SHERMAN SAVAGE, THE CONTROVERSY OVER THE DISTRIBUTION OF ABOLITION LITERATURE 1830-1860 (1968); JOHN LOFTON, THE PRESS AS GUARDIAN OF THE FIRST AMENDMENT (1980). For a splendid and comprehensive history of the petition question, see WILLIAM LEE MILLER, ARGUING

speech struggles to section one of the Fourteenth Amendment, our second bill of rights. Nor have they considered the relation of struggle over anti-slavery speech from 1830 to 1866 to modern free speech ideas. As legal scholarship on the history of section one of the Fourteenth Amendment and its relation to free speech grows, perhaps the subject will receive more attention in casebooks.[8]

My casebooks from the 1960s did not actually make much in the way of statements about free speech history. Instead, they simply presented certain cases, certain parts of the fossil record. From those cases, readers might infer a story. If you used the casebooks I studied to understand free speech history, you would get a story that left out quite a lot.

Here is the picture I got: In the beginning of free speech history, there was World War I.[9] At first, the courts adopted a narrow view of the types of speech that were protected by the First Amendment. Speakers who intended to cause a violation of the selective service law, for example, could be punished, and intent was judged by the natural tendency of their words.[10] So a man who printed the Thirteenth Amendment on one side of his leaflet and a call for legal measures to resist the draft on the other was guilty of violating the Espionage Act and sentenced to prison.[11] Though my casebook did not tell me, court decisions were even worse than that. A

ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS (1996). An excellent shorter account appears in LEONARD L. RICHARDS, THE LIFE AND TIMES OF CONGRESSMAN JOHN QUINCY ADAMS (1986). For another excellent discussion, see GILBERT H. BARNES, THE ANTISLAVERY IMPULSE (1933). For additional nineteenth-century controversies, see DONNA L. DICKERSON, THE COURSE OF TOLERANCE: FREEDOM OF THE PRESS IN NINETEENTH CENTURY AMERICA (1990).

[8] For fairly brief accounts of the relation of free speech struggles from 1830 to 1860 to the Fourteenth Amendment, see W. W. Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954). *See also, e.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986). For more recent and detailed accounts, see *infra* notes 58-59; 66; 75, and see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998). For another perspective, see, for example, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT, ch. 8 (2d ed. 1997).

[9] *E.g.*, NOEL T. DOWLING & GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 903 (7th ed. 1965).

[10] *See* Debs v. United States, 249 U.S. 211 (1919).

[11] *Id. See also* Schenck v. United States, 249 U.S. 47 (1919).

man was sentenced to years in prison for refusing to kiss the flag, saying it was only cloth and paint and might be covered with microbes;[12] another was sentenced to jail for telling a woman who was knitting socks for soldiers that no soldier would ever see those socks.[13]

However, soon after World War I, Justices Holmes and Brandeis began to dissent, even in cases involving people who did advocate illegal conduct.[14] Eventually, in the 1930s and 1940s, these dissents and other protective decisions became the source of a much more robust free speech doctrine.[15] This protection was substantially diminished in the Communist cases of the 1950s,[16] but was revived and strengthened in the 1960s.[17] This was the world according to my casebooks of the 1960s and early 1970s, if the reader used them as free speech history books, instead of as a tool to understand current law. Of course, the books were mainly designed to teach current doctrine, not to survey free speech history.

Incorporation of the Bill of Rights as a limit on the states under the Fourteenth Amendment was a minor part of the free speech story. The chapter on free speech did include the 1925 case, *Gitlow v. New York*,[18] the case in which the Supreme Court assumed, for purposes of the decision, that the First Amendment guarantee of freedom of speech and press limited the states as a result of the due process clause of the Fourteenth Amendment. The Court soon treated the dicta in *Gitlow* as a square holding that the guarantees of free speech and press limited the

[12] *See* Ex parte Starr, 263 F. 145 (D. Mont. 1920).

[13] State v. Freerks, 168 N.W. 23 (Minn. 1918). For a fine discussion of the World War I era cases, see CHAFEE, *supra* note 7, at 36-141.

[14] *E.g.*, Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J. dissenting); Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J. concurring).

[15] *E.g.*, Near v. Minnesota, 283 U.S. 697 (1931); Herndon v. Lowry, 301 U.S. 242 (1937); Bridges v. California, 314 U.S. 252 (1941).

[16] *E.g.*, Dennis v. United States, 341 U.S. 494 (1951).

[17] *E.g.*, Bond v. Floyd, 385 U.S. 116 (1966); Edwards v. South Carolina, 372 U.S. 229 (1963) ; Brandenburg v. Ohio, 395 U.S. 444 (1969).

[18] Gitlow v. New York, 268 U.S. 652 (1925); DOWLING & GUNTER, *supra* note 9, at 908.

states under the Due Process Clause. As a matter of persuasive legal method, treating an assumption in dicta as a holding leaves something to be desired.

If the reader looked further, the picture would be much the same, but even bleaker. Some books, no doubt, gave a more complete picture and told their readers about William Blackstone, the famous commentator on English law who announced that freedom of the press was limited to freedom from prior restraint. At one time in England the government licensed all publications. Publishing without a license was a crime (regardless of what was in the publication), much as driving without a license is a crime today, regardless of how perfect the driving may be. According to Blackstone, free press meant that no license – no prior restraint – could be required, but people could be punished for publications that had a bad tendency to cause harm. Some early American court decisions followed Blackstone.

A reader who left the casebooks of the 1960s and looked in the United States Reports might have found the 1907 case of *Patterson v. Colorado*.[19] Tom Patterson was a crusading newspaper editor who criticized the Colorado utility monopoly and favored municipal electric power. In a referendum, state voters amended the state Constitution to allow home rule for Denver. Home rule would have allowed Denver to establish municipal electric power. Voters had also amended the state constitution to create new seats on the state supreme court, the justices to be appointed by the newly elected governor. However, the lame-duck Republican governor filled the court seats before they were scheduled to come into existence. The expanded court held the constitutional amendment allowing municipal power in Denver unconstitutional, as a violation of the very document being amended. This is a novel constitutional doctrine, to say the least. The Colorado Supreme Court and the lame-duck legislature decided various election contests so that the apparent election winners, including the Democratic pro-municipal power candidate for governor, were now the losers.

[19] Patterson v. Colorado, 205 U.S. 454 (1907). Justice John Marshall Harlan dissented. The story is elegantly told in LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION 1-7 (1991). The case also appears in VAN ALSTYNE, *supra* note 5.

Tom Patterson was outraged by the court's conduct. In 1905, he wrote a stinging editorial in his newspaper:

> The people of St. Louis and San Francisco, who have been enjoying the full benefits of just such a system of government as the amendment provides will be astonished to learn that they no longer live in a republic–for the Colorado supreme court holds that such a government is so unrepublican that it cannot be tolerated in Colorado. . . . What next? If someone will let us know what the utility corporations of Denver and the political machine they control will demand, the question will be answered.[20]

Patterson made additional criticisms in this vein.

Patterson was cited for contempt for criticizing a particularly outrageous state supreme court decision. The same court he had criticized summarily found him in contempt. Since the charge was contempt, Patterson got no right to a jury trial. He was also denied the right to prove that his charges were true. The United States Supreme Court upheld the state contempt decision.[21] Speaking through Justice Oliver Wendell Holmes, the Court held that truth was no defense – by analogy to the common law and the Blackstonian idea that the greater the truth, the greater the libel. Holmes suggested that the First Amendment might not limit the states, but if it did, it was merely a protection against prior restraint, not against subsequent punishment. Because Patterson's criticism had a bad tendency to interfere with the administration of criminal justice, it could be punished.[22] Justice Holmes and the Supreme Court of the United States essentially endorsed the crabbed view of free speech embraced by English judges and commentators.

These (incomplete) pieces of the fossil record suggest that, as a matter of history, there was far less to the guarantee of free speech than meets the eye. Still, students who continued to

[20] People *ex rel.* Attorney General v. News-Times Pub. Co., 84 P. 912, 913-14 (1906), *quoted in* POWE, *supra* note 19, at 3-4.

[21] Patterson v. Colorado, 205 U.S. 454 (1907). Justice John Marshall Harlan dissented. *Id.*

[22] Patterson v. Colorado, 205 U.S. 454, 462 (1907).

search would find some cases that were more protective of speech.[23]

At this point, step back and look at the historic right of free speech and think about what it looks like if we attempt to reconstruct it from a casebook supplemented by early cases. What sort of animal are we likely to build from the fossil remains of these cases? Taken as a whole, the casebook fossil records suggest that the evidence for a robust historic right to free speech is weak indeed. This historic view of free speech seems to provide very little protection for controversial speech. Speech with a bad tendency to cause harm – as almost all controversial speech does– can be banned.[24] Even truth may not be a defense.[25] Furthermore, there is substantial authority that freedom of the press was originally intended to mean only freedom from prior restraint.[26] Finally, because the guarantees of free speech in the First Amendment did not limit the states before 1925, free speech was essentially a matter of local option.[27] My 1960s casebook gave some, but not much, indication that the Fourteenth Amendment was designed to change things – to require states to obey the guarantees of the Bill of Rights, because it included Justice Black's dissent in *Adamson*,[28] together with a note implying that Charles Fairman had effectively answered it.[29] *Adamson* did not appear in the section of the book devoted to free speech, however. Many modern free speech ideas – that the free speech guarantee protects uninhibited and robust discussion of matters of public concern; that the government cannot

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[23] *See* Michael Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263 (1986). For a bleaker view, see David Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514 (1981). Professor Rabban has looked at post-Civil War free speech history in his classic work, which is cited *supra* at note 4.

[24] Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919); Patterson v. Colorado, 205 U.S. 454 (1907).

[25] *Patterson*, 205 U.S. at 462.

[26] *Id.*

[27] Barron v. Baltimore, 32 U.S. 243 (1833); DOWLING & GUNTHER, *supra* note 9, at 712.

[28] Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J. dissenting).

[29] DOWLING & GUNTHER, *supra* note 9, at 730 (omitting Crosskey's response to Fairman); Adamson v. California, 332 U.S. 46, 68 (1947).

establish an orthodoxy; that the states must obey free speech commands; and that ideas may not be banned because they are deeply offensive to some or even because the majority find them offensive or because they might cause serious harm in the long run – seem to be a creation of the dissents of the 1920s, and the decisions from 1930 to 1965 and later.[30]

The Supreme Court began a far more robust protection of free speech in the 1930s. Free speech became a potent right that limited states and localities as well as the national government.[31] The trend continued in the Warren Court decisions of the 1960s.[32]

In many areas of law, the Warren Court produced a judicial revolution–racial integration, a criminal procedure revolution, and expanded protection for speech and press. Revolutions spawn counter-revolutions. One of the key tenets embraced by many of the counter-revolutionaries was that the Constitution should be interpreted in accordance with original intent, or later, in accordance with original meaning. According to its critics, the Warren Court had failed to follow original intent. At times, at least, that was true for the Warren Court,[33] as it has been for all its predecessors and for all its successors and for all the justices.[34] According to some of its critics, because it departed from the original design as they understood it, the Warren Court was wrong.[35] The critics' claim was that we should look at the intentions of the Framers[36] or (later) the common understanding of the words of the constitutional text at the time of their

[30] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Bond v. Floyd, 385 U.S. 116 (1966); Brandenburg v. Ohio, 395 U.S. 444 (1969).

[31] *E.g.*, Near v. Minnesota 283 U.S. 697 (1931).

[32] *E.g.*, *Bond,* 385 U.S. 116; *Sullivan,* 376 U.S. 254; Edwards v. South Carolina, 372 U.S. 229 (1963); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts 383 U.S. 413 (1966).

[33] *Cf.* Brown v. Board of Educ. 347 U.S. 483 (1954).

[34] Scholars and judges, however, often have great difficulty in agreeing on specific cases. *Cf.* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); *cf.* Alden v. Maine, 527 U.S. 706 (1999).

[35] *See, e.g.,* BERGER, *supra* note 8.

[36] *Id.* at 199.

adoption.[37]

President Reagan's Attorney General, Ed Meese, for example, suggested that the Framers of the original Constitution had not intended to apply the Bill of Rights to the states.[38] According to Mr. Meese, this fact was established in the 1833 case of *Barron v. Baltimore*.[39] Meese implied that the incorporation doctrine was illegitimate.[40] Such a conclusion is of great significance for free speech jurisprudence. If the Fourteenth Amendment does not apply the guarantees of free speech, press, assembly, petition, and religion to the states, then the basis for most Supreme Court cases protecting these rights has been removed.

A couple of things are worth noting. Mr. Meese's Framers were the framers of 1787 and 1789. The 1866 Framers of the Fourteenth Amendment were apparently not on his radar screen. He said nothing about the history of state suppression of anti-slavery speech, press, and religion from 1835 to 1866; he said nothing about the fact that Republicans had been targeted for prosecution and suppression; and he said nothing about searches designed to find and burn anti-slavery literature. Southern laws that provided whipping, prison, or the death penalty for opposition to slavery were apparently unknown to the Attorney General. Ed Meese, like the rest of us, probably learned his constitutional history from case books, and these events probably did not make it into his casebook.

Think for a moment about the fossil record that Ed Meese probably found in casebooks.

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[37] For a discussion of this method see, Antonin Scalia, *Common-Law Court in a Civil Law System: The Role of the Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38 (Amy Gutmann ed., 1997). For earlier advocates of the method, see for example, W. W. Crosskey, *supra* note 8, at 2-4.; Eisner v. Macomber, 252 U.S. 189, 220 (1920) (Holmes, J., dissenting); Adamson v. California, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring). Though Frankfurter advocated the method in *Adamson*, he did not practice what he preached. Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071 (2000) [hereinafter Curtis, *Historical Linguistics*].

[38] Edwin Meese, Address before the American Bar Assn. 14 (July 9, 1985).

[39] Barron v. Baltimore, 32 U.S. 243 (1833).

[40] Edwin Meese, Address before the American Bar Assn. 14 (July 9, 1985). Mr. Meese included these remarks in the copy of his address given to the press, but did not deliver them orally during his speech, a discrepancy the press copy warned the reader to expect. Perhaps the written copy was intended as a trial balloon.

These books had treated history in a cursory fashion because they were designed to teach the *current* law by means of illustrative cases. Events that do not produce cases–and typically Supreme Court cases– tend not to make it into constitutional law casebooks. Even old cases must be discarded to make room for new ones that establish new principles.

Although casebooks were not designed to survey the history of free speech, they supplied much of the intellectual framework for those who decided that what was awkwardly called "originalism" should be *the* means of constitutional analysis. For most law students, lawyers, and judges, casebooks provide most of what they knew about free speech history.

Of course, scholars such as Raoul Berger had done historical analyses,[41] and Mr. Meese may well have also relied on them without citing them. However, accounts like those of Mr. Berger leave out very substantial parts of the story. They entirely omit, for example, the struggles for free speech and civil liberty that were central to the battle over slavery that raged in the United States between 1835 and 1866. Because so many casebooks left out so much of the story, lawyers and judges may have been more inclined to believe deeply flawed accounts.

IV. FREE SPEECH STORIES

I now want briefly to examine three free speech stories. In the interest of space, I will paint with a broad brush. The first, the Sedition Act, is the most familiar to free speech scholars, though most students learn few, if any, of the details. Today, this story, in a very abbreviated form, is often mentioned by casebooks.

A. The Sedition Act

In 1798, the Congress of the United States passed a statute that made it a crime to make false and malicious criticisms of the president or Congress (both controlled by the Federalist party).[42] Federalist proponents of the Act gave some examples of the sort of speech that needed to be controlled: statements that Congress would pass unconstitutional acts, dangerous to the

[41] BERGER, *supra* note 8, at ch.8.

[42] Act of July 14, 1798, 1 Stat. 596. *See generally* CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE, *supra* note 3, at 52-104.

liberty of the people;[43] and newspaper comments suggesting that the proposed Sedition Act raised the question of whether there would soon be more freedom in Philadelphia or in Constantinople.[44]

An expressed rationale for the Sedition Act was that a republican government could not survive unless the people had a good opinion of the government. Still, the Act did not protect all elected officials. The Vice President and individual Republican members of Congress were not protected by the Act. As it was interpreted and administered, the Act reached "false" opinions as well as false facts. Statements by Republican congressmen and Republican newspaper editors that President Adams lacked capacity for the job, was given to ridiculous pomp, and had established a standing army produced prosecutions and convictions.[45]

The Sedition Act was a law that punished criticism of the Federalist incumbent, but not the Republican challenger; a law that allowed courts and juries to brand Jeffersonian political views false and to punish them; and a law that protected the majority Federalists, but not the Jeffersonian Republicans. It was enforced by prosecutors selected by the President and brought before juries selected – and packed – by Federalist marshals and judges appointed by Federalist presidents. The Act had a "sunset provision" so that it would expire with the end of the term of Federalist President Adams.

Jeffersonian Republicans made three basic criticisms of the act. First, they insisted that the Federal government lacked any power to prohibit speech or press.[46] Some said abuses of these freedoms were matters for state courts. Jeffersonian Republicans pointed out, quite correctly, that the original Constitution had been attacked because it lacked protection for

[43] 5 ANNALS OF CONG. 2093-98 (1798).

[44] AURORA, Jan. 3, 1799, at 3.

[45] *E.g.*, United States v. Lyon, 15 F. Cas. 1183 (C.C.D. Vt. 1798) (No. 8,646); United States v. Cooper, 25 F. Cas. 631 (C. C. D. Pa. 1800) (No. 14,865).

[46] 5 ANNALS OF CONG. 2151 (1799); AMAR, *supra* note 8, at 36-37 (describing the lack of federal power over the press).

freedom of speech and press and that supporters of the Constitution had responded that critics should be happy and not worry: the national government and Congress had no power over the press, so no guarantee was needed.[47] (Anti-federalists had replied that power over speech and press might be exercised under the Necessary and Proper Clause.) In response to these concerns, the Bill of Rights provided that Congress shall make no law abridging freedom of speech or of the press. So Republicans insisted that speech and press had a double protection against federal suppression. There was no power in the original Constitution and there was an explicit guarantee in the First Amendment.

Without more, it might seem that Jeffersonian Republicans thought of the guarantee of free speech as merely a jurisdictional device, a division of power in the federal system. But there was more. Jeffersonian Republicans also said that the Sedition Act was inconsistent with free speech and press, which guaranteed a full right to discuss the public character and acts of public officials and all questions of public policy.[48] Republicans denied that freedom of speech was simply a protection against prior restraint.[49] English precedent might be suited to a monarchy with a hereditary House of Lords, but it was not suitable for a nation founded on the ideal of popular sovereignty. Those who made these arguments demanded a broader protection of free speech than that which orthodox legal understanding provided. They drew on and developed the heritage of radical dissent that stretched from the Levellers of the English Civil War period through the Radical Whigs and Cato's Letters.

Finally, Jeffersonian Republicans noted that the Act was a political device prepared for party purposes that would be enforced by politically motivated functionaries. Political trials would produce political verdicts.[50]

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[47] AMAR, *supra* note 8, at 36-37.

[48] 5 ANNALS OF CONG. 2140-41 (1798).

[49] *Id*. at 2160; *Congressional Conundrum*, AURORA, Feb. 28, 1799, at 3; TIME PIECE (N.Y.), July 13, 1798, at 2.

[50] 5 ANNALS OF CONG. 2140, 2162 (1798).

Federalists defended the Act as fully consistent with free speech and press. They cited Blackstone and English precedent.[51] Freedom of speech was merely a protection against prior restraint. It protected the proper use of speech, not its abuse. Speech or press with a bad tendency could be punished.[52] Why, they demanded, did Republicans object to a law designed to punish malicious lying?[53]

In the prosecutions that followed, where were the courts? James Madison had told the first Congress that a bill of rights would enable the courts to protect basic liberties; a bill of rights would arm the courts with the power to enforce its guarantees and the courts would become an impenetrable barrier against violation of these basic guarantees.[54]

In the case of the Sedition Act, it did not work out that way. Judges, including Supreme Court justices, trotted around their circuits and lectured grand juries on the constitutionality of the Sedition Act. They behaved just as the Republicans in Congress had feared. Federalist judges convicted Republicans. The judges were often more aggressive prosecutors than the prosecutors themselves.[55]

Jefferson was elected president in 1800 (with the help of the Three-fifths Clause). The Sedition Act expired, and Jefferson pardoned those convicted of violating the act. By 1840, in spite of the earlier decisions by Supreme Court justices on circuit upholding the Act, there was a broad national consensus that the Sedition Act was unconstitutional. A congressional committee recommended, and Congress passed by an overwhelming majority, a bill refunding the fine that Republican congressman Matthew Lyon had paid for violating the Act, "so as to place beyond question the mandate of the Constitution against abridging the liberty of the press." The bill was

[51] *A Charge Delivered to the Grand Jury of the U. States*, AURORA, May 23, 1799, at 2.

[52] *E.g.*, *Sketch of Chief Justice Dana's Charge*, MASSACHUSETTS MERCURY, Jan. 1, 1799, at 1.

[53] 5 ANNALS OF CONG. 2112 (1798).

[54] 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1030-31 (Bernard Schwartz ed. 1971).

[55] United States v. Cooper, 25 F. Cas. 631 (C. C. D. Pa. 1800) (No. 14,865).

supported by both Waddy Thompson, a strong supporter of slavery from South Carolina and by Representative Slade, an anti-slavery congressman from Lyon's district in Vermont.[56]

B. Abolition

The consensus on free speech and federal power obscured a fundamental issue as to state power. In the mid 1830s, some assumed that the suppression of speech or press by the states was a different matter from federal suppression–a question for each state to decide. For these people, free speech was a matter of local option. Supreme Court decisions supported this view. The Bill of Rights, the Court ruled in 1833, limited only the national government, not the states.[57] While many dissented, this was the orthodox judicial view.

The scope and meaning of freedom of speech, press, and religion became crucial as slavery became the central political issue racking the nation. Northern states had largely abolished slavery. In the South, the institution was becoming more entrenched. To understand what happened next, it is useful to know the story that much of the nation was telling itself about slavery: of course, slavery was an evil, but the evil was not the responsibility of Americans in the 1830s. It was the fault of the British who had imposed the system on the colonies. Because many thought that freeing the slaves and integrating them into American society was not a viable option, and because deporting and colonizing so many people seemed impractical and too expensive, the solution must be left to time and providence. God should be trusted to solve problems too complex for man.[58] On the issue of slavery, the proper course was to sit on one's hands and button one's lips.

Perhaps nations, like individuals, engage in repression, concealing from their conscious minds truths about the bleaker side of their character. At any rate, to a remarkable degree, many

[56] CONG. GLOBE, 26th Cong., 1st Sess. 409 (1840).

[57] Barron v. Baltimore, 32 U.S. 243 (1833); Permoli v. New Orleans, 44 U.S. 589 (1845).

[58] *See generally* CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE, *supra* note 3, at 125-33; Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery, Speech, Press, and Petitions in 1835-37*, 89 NW. U. L. REV. 785, 786-802 (1995) [hereinafter Curtis, *Curious History*].

Americans repressed thoughts about slavery and what the peculiar institution said about our nation and its ideals.

In the mid-1830s, the Abolitionist bull charged into this political and psychological china shop. Abolitionists insisted that slavery was an evil, a sin. But those responsible were the American slaveholders of the day, not English men from the dim past. Slaveholders were "man-stealers," receivers of stolen goods, violators of God's law, and criminals against humanity. The abolitionist solution was for slaveholders to renounce immediately the sin of slavery. By not doing what it could to end the institution, the rest of the nation was at fault as well.

To bring the sin of slavery directly to the attention of slaveholders, abolitionists mailed large numbers of anti-slavery tracts to the Southern elite. Abolitionists combined moral and prudential arguments. They warned of the danger of slave revolts and suggested abolition as a solution. Their tracts were often illustrated with wood-cut prints of masters mistreating slaves. The illustrations were particularly appalling to the critics of the abolitionists. Though the Southern states had made it a crime to teach slaves to read–in order to protect them from infection by anti-slavery ideas– there was no way to insulate them from pictures.

The South exploded. Men entered the Charleston, South Carolina, post office and seized and burned abolitionist publications. In the South, public meetings and legislatures demanded action to silence abolitionists. Throughout much of American history, including the civil rights revolution of the 1960s, many southerners accepted a comforting mythology. Blacks – slave or later free – were content and relations between whites and blacks were happy and friendly. But this idyllic condition could be shattered by outside agitators. Abolitionists were the original outside agitators. (Of course, inside agitators were even worse.)

But the South was not alone. In public meetings throughout the North, former Federalists such as Harrison Gray Otis and Chancellor Kent joined Democrats in resolutions that demanded that the abolitionists shut up. As the critics saw it, abolitionist speech had a very bad tendency to cause slave revolts, sectionalism, and civil war. It did not matter that typically abolitionists did not then advocate these things. Since critics thought these calamities were the natural long-term

results to be expected from strident anti-slavery speech, the speech had to be silenced, though there was considerable confusion as to how that result could or should be accomplished.

Mobs broke up abolitionist meetings in the North; northern and border state politicians celebrated the mobs as enforcing a wisdom above and beyond all law; and southern mobs and laws punished those who expressed anti-slavery sentiment. In Cincinnati, an anti-abolition mob destroyed the press of James Birney's paper, the *Philanthropist*. The mayor of the town was one of the leaders of the mob. The well-to-do were well represented in the anti-abolitionist mobs. These were respectable mobs, made up of gentlemen of property and standing. Many feared that the slavery issue would disrupt trade between the North and the South. As is the case today, many wanted to avoid questions of human rights so as not to disrupt trade.[59]

At the national level, Congress passed a "gag rule" requiring that petitions touching on the subject of slavery be laid on the table and not discussed. It considered a bill to ban abolitionist publications from the mails. The Postmaster General announced that postmasters had no legal authority to keep abolitionist publications out of the mails, but he encouraged them to do so anyway. He explained that postmasters owe an obligation to the laws, but a higher obligation to their communities. The New York postmaster embargoed abolitionist publications, effectively blockading the abolitionist postal appeal to Southerners.[60]

The attack on the free speech rights of abolitionists produced a reaction. While, at first there was little public support for abolitionists (in the North or South) and substantial public support for the idea that they should shut up, there was also substantial support for free speech. Southern legislatures demanded laws to suppress abolitionist meetings and publications in the North. But no Northern legislature complied. Non-abolitionists began to criticize mobs, gag

[59] CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE, *supra* note 3, at 125-51; Curtis, *Curious History*, *supra* note 58, at 809-13; Michael Kent Curtis, *The 1837 Killing of Elijah Lovejoy by an Anti-Abolition Mob: Free Speech, Mobs, Republican Government, and the Privileges of American Citizens*, 44 UCLA L. REV. 1109, 1118-42 (1997) [hereinafter Curtis, *Lovejoy*].

[60] CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE, *supra* note 3, at 164-75; Curtis, *Curious History*, *supra* note 58, at 817-36.

rules, and proposals to ban abolitionist speech as a violation of democracy and free speech. Congress failed even to pass a watered-down bill aimed at the abolitionist postal campaign. The proposed bill would simply have directed Southern postmasters not to deliver publications dealing with slavery which also violated state laws. A number of congressmen suggested that congress lacked power to limit freedom of the press – and (ominously) several said that states could deal with the problem.[61]

Although the postal bill failed to pass, postmasters, nonetheless, continued to embargo abolitionist publications. Opposition to the gag rule mounted and it was finally revoked in 1844.[62]

To protect its peculiar institution, the Southern elite believed the institution must expand into new territories. Otherwise, the slave states would soon be hopelessly outnumbered in the national government. Slavery was becoming a gut political issue because slavery in the territories confronted free white workers with direct competition with slave labor and white workers and farmers feared that the invisible hand would gradually reduce them, like the slaves, to bare subsistence. But in slave territories, even the right to oppose slavery was imperiled. Slave territories had to have slave codes and the Southern censorship regime.

Security for slavery also required exporting some slave state institutions to the North. Since the nation was connected by roads, canals, the postal system, and the media, the Southern rule of silence about slavery needed to be exported to the North.

In the years after 1835, abolitionists and others began to reframe the issue. The question was no longer simply freedom for the slave; it implicated the freedom of all Americans because slavery was inherently hostile to liberty, even in the North. Slavery and liberty were incompatible. Abolitionists and others began to suggest that freedom of speech, press, and

[61] CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE, *supra* note 3, at 164-93; Curtis, *Curious History*, *supra* note 58, at 813-59.

[62] CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE, *supra* note 3, at 175-81; Curtis, *Curious History*, *supra* note 58 at 846-49.

religion were basic rights of all Americans everywhere in the nation and were protected by both state and national constitutions.

Elijah Lovejoy was an anti-slavery minister who edited a religious newspaper. When he spoke out against slavery and mob violence, his press was destroyed, and he was driven from the slave state of Missouri. Lovejoy relocated to Alton, Illinois, but there also mobs continued to harass him, again and again seizing his press and dumping it in the Mississippi river. Next, Lovejoy and friends barricaded the press in a stone warehouse and stationed armed guards. Ultimately, Lovejoy was killed as he and his allies sought to protect his fourth press from a mob.[63] The event caused a national sensation, a "political earthquake" as John Quincy Adams described it. The killing of Lovejoy underlined the threat that slavery posed to liberty, even in the North.[64]

The conflict over slavery and free speech provoked people to express basic ideas about free speech. Supporters of suppression espoused a number of constitutional theories to justify silencing opponents of slavery. First, the Southern elite and their allies suggested that abolitionist speech could be suppressed because of its bad tendency to cause slave revolts and sectional conflict. Second, they noted that the Constitution recognized slavery. As a result, anti-slavery speech violated the constitutional compact and was not entitled to protection. The pro-slavery policy of the constitution trumped any free speech claim. Third, they argued that anti-slavery speech was seditious. Fourth, it was similar to libel. Just as libel and slander of individuals were criminal, so was libel of the entire group of slaveholders. Finally, these attacks on slavery inflicted emotional distress on slaveholders–wounded their feelings–and that was another justification for suppression. If Northern constitutions protected such abuses of free speech, Southerners insisted, then Northerners must promptly change their constitutions.[65]

[63] CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE, *supra* note 3, ch.10; Curtis, *Lovejoy*, *supra* note 59, at 1132-42.

[64] Curtis, *Lovejoy*, *supra* note 59, at 1142-58; 1183-84.

[65] Curtis, *Curious History*, *supra* note 58, at 849-59.

The defenders of free speech treated it as a right that belonged to all Americans. All people had the right to discuss political, moral, and social questions and to espouse any theory they chose. Free speech protected the poet, the philosopher, and the scientist. All people had an interest in its preservation. The majority had no right to silence the minority. Government could not establish orthodox opinion. The defenders insisted that free speech protected hateful and evil ideas as well as virtuous ones. Constitutional values such as republican government (or the protection of slavery) did not justify silencing other points of view. People were still free to advocate monarchy or to attack cherished institutions such as marriage.[66] By the later 1830s, more and more people began to assert that Southern laws that silenced anti-slavery speech violated the federal Constitution and denied a basic privilege of American citizenship.

In the Southern states as well as in the national government, Southern slaveholders had more political power than their numbers justified. Some slave states had their own state three-fifths clauses; in some states, legislative apportionment gave slaveholding areas excess power. So in the nation at large and in the South, slavery multiplied and then re-multiplied the political power of slave holders. Where slavery was strongest, it used its inflated political power to protect the institution from the democratic process.

Southern politicians began to demand ever greater protection for slavery–more slave states to balance the free states; territories open to slavery; and more vigorous enforcement of the fugitive slave laws. The demand to expand the domain of slavery eventually produced a powerful anti-slavery party in the North–a party that called itself Republican. (This was the second Republican party in American history. Jeffersonian Republicans had begun to call themselves Democrats.) Meanwhile, in its determination to protect the institution of slavery, the South was becoming a closed society.

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[66] CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE, *supra* note 3, ch. 9; Curtis, *Curious History*, *supra* note 58, at 826-29; 859-66; *see also id.* at 830-36; Curtis, *Lovejoy*, *supra* note 59, at 1150-59. *See also* Michael Kent Curtis, *The 1859 Crisis over Hinton Helper's Book,* The Impending Crisis: *Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHI.-KENT L. REV. 1113, 1146-59 (1993) [hereinafter Curtis, *Helper*].

C. The Rise of the Second Republican Party and the Suppression of Republican Speech

By 1856 to 1859, slavery was the main political issue facing the nation. A great national party had been formed based on a policy of containment – to prohibit slavery in the territories. While Republicans disclaimed any national power to abolish slavery, they insisted that slavery was wrong and must be put on the road to ultimate extinction.

When I studied this subject in high school and college, it was hard to understand why the South seceded. Republicans, after all, were merely committed to limiting slavery to the South. But actually, more was at stake. Republicans hoped to develop a Republican opposition in each Southern state and to attack slavery from within the Southern states themselves. Southern slaveholders were unwilling to expose slavery to the vicissitudes of Southern anti-slavery political agitation, convinced that the institution could not survive it.[67]

In 1856, in North Carolina, Benjamin Hedrick was a talented and popular professor of Chemistry at the University of North Carolina. He announced his support for John C. Fremont, the Republican candidate for president. As a result, Hedrick was fired from his teaching job at Chapel Hill, and a mob drove him from the state.

In 1857, another North Carolinian, Hinton Rowan Helper wrote a book attacking slavery. Helper called on non-slaveholding white Southerners to unite for political action to abolish slavery at the state level. Helper insisted that slavery caused Southern economic backwardness, and it injured non-slaveholding whites.[68] According to Helper's plan, slaveowners would not be compensated. Instead, they would be taxed to provide support for the emancipated slaves who chose colonization or relocation to the North.

Helper called for free speech and democratic action. But if "the lords of the lash" and their "cringing lickspittles" used violence against the anti-slavery party, Helper said the non-slaveholders should resist. There were, he pointed out, at least three non-slaveholders to every

[67] *See generally* CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE, *supra* note 3, ch. 12; Curtis, *Helper*, *supra* note 66, at 1149-50.

[68] Curtis, *Helper*, *supra* note 66, at 1141-43.

slaveholder, not counting the slaves who "in nine cases out of ten would be delighted to cut their master's throats."[69]

Helper's book got an enthusiastic reception from Republicans. Here was a Southerner who pointed out the danger slavery posed to the free white laborers in the South and the danger slavery in the territories would pose for the people of the North. Three-fourths of the Republicans in the House endorsed a plan to publish an abridged version of the book as a campaign document. The endorsers included two Ohioans: John A. Bingham, future author of most of section one of the Fourteenth Amendment, and John Sherman, a candidate for Speaker of the House.[70]

Then John Brown launched his raid on Harper's Ferry, in an effort to start an anti-slavery guerilla war. Initially, abolitionists had favored peaceful methods. Now, however, after years of Southern suppression of anti-slavery speech, some militant abolitionists favored violence. Republicans, typically, did not. Yet, many Democrats saw Republicans as fellow travelers.

Democrats in Congress sought to use the most inflammatory passages in Helper's book to tie Republicans, including John Sherman, to the Harper's Ferry raid. Helper, they said, had written an incendiary book; it advocated fire, arson, and cutting throats. This was not a fair reading of the book, but that is how many Southerners and their allies read it. These Democrats portrayed Republicans as accessories before the fact to the John Brown crime. The proof was that they endorsed Helper's book. A North Carolina grand jury actually sought extradition of the endorsers of the book. North Carolina sent a request to the governor of New York to extradite all endorsers, including, incidentally, the governor himself. The governor did not comply with the request. In the South, endorsers and circulators of Helper's book were treated as felons. In the North, the endorsers and circulators were mainstream leaders and members of the Republican party.

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[69] *Id.*

[70] CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE, *supra* note 3, at 271-76; Curtis, *Helper*, *supra* note 66, at 1143.

Sherman and a few conservative endorsers repudiated the book, saying feebly that they had not read it.[71] But a number of Republicans defended the book. They insisted on freedom for anti-slavery speech directed to white southerners. They said Southern states were violating national constitutional guarantees of free speech, free press, and freedom of religion. They called for freedom of speech on all public questions, all social questions, "all questions that concern the human race" and endorsed "the boldest discussion."[72] They denied that Helper's book advocated arson and murder. Those who made such charges, these Republican said, had never read the book. They demanded that the South protect "Northern citizens" in "the enjoyment of their constitutional rights." They said, in the words of one Republican congressman, "the North demands freedom of speech and of the press; and if your peculiar institution cannot stand before them, let it go down."[73]

In response to the uproar over Helper's book, every Republican in the Senate who voted on the matter supported the following free speech resolution:

> [F]ree discussion of the morality and expedience of slavery should never be interfered with by the laws of any State, or and the United States; and the freedom of speech and of the press, on this and every other subject of domestic and national policy should be maintained inviolate in all the states.[74]

The Senate resolution was consistent with the Republican campaign slogan: "free speech, free soil, free territories, free labor, and free men."

In discussions of free speech and slavery in the years between 1835 and 1866, people commonly described freedom of speech, press, and religion, as well as other liberties protected by the Bill of Rights as privileges or immunities of American citizens that no state should abridge. This fact and the history I have discussed illuminate the likely common understanding

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[71] CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE, *supra* note 3, at 776; Curtis, *Helper*, *supra* note 66, at 1144-47.

[72] Curtis, *Helper*, *supra* note 66, at 1154.

[73] *Id*. at 1146-59.

[74] *Id*. at 1157-58.

of section one of the Fourteenth Amendment, which provides that "No state shall . . . abridge the privileges or immunities of citizens of the United States."[75]

The southern intellectual blockade was enforced by the courts. Daniel Worth was a 68-year-old minister preaching an anti-slavery version of the gospel in Guilford and Randolph Counties of North Carolina. Worth was a Republican activist. He sold copies of Hinton Helper's *Impending Crisis* and subscriptions to the *New York Tribune*, a Republican newspaper. For distributing copies of *Impending Crisis*, Worth was arrested, tried, and sentenced to prison. He was convicted of violating a North Carolina statute that forbade disseminating pamphlets with a tendency to make free blacks or slaves discontent and sentenced to prison.[76]

The North Carolina Supreme Court upheld Worth's conviction.[77] If people were allowed to give such books to whites who might favor the scheme, the North Carolina court explained, the inevitable tendency would be for the ideas in such books and pamphlets to reach the blacks.[78] The result was that, on the subject of slavery, white voters could be reduced to reading only items suitable for slaves. A Raleigh newspaper urged public officials and postmasters to carefully search for and burn the Republican *New York Tribune* and letters from Republican congressmen.[79] As a result of the uproar over the Helper book, the North Carolina legislature changed the statute under which Worth had been convicted. Henceforth, the death penalty should be imposed for the first offense.[80]

This history illuminates the campaign slogan of the Republican party: "free speech, free

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[75] *See generally* Curtis, *Historical Linguistics*, *supra* note 37.

[76] For the story, see CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE, *supra* note 3, ch.13; Curtis, *Helper*, *supra* note 66, at 1159-67. For two fine studies that bear directly on the *Worth* case, see Clifton H. Johnson, *Abolitionist Missionary Activities in North Carolina*, 40 N.C. HIST. REV. 295, 295-301 (1963) and Noble J. Tolbert, *Daniel Worth: Tar Heel Abolitionist*, 39 N.C. HIST. REV. 284, 284-90 (1962).

[77] State v. Worth, 52 N.C. 488 (1860).

[78] *Id*. at 492.

[79] Curtis, *Helper*, *supra* note 66, at 1162.

[80] *Id*. at 1167.

men, free territory, free soil." It explains what Republicans like Abraham Lincoln and Lyman Trumbull were complaining about when they objected to the inability of Republicans to campaign in the South.[81] When Lincoln urged Republicans not to be intimidated by threats of dungeons, this history explains what he was talking about.[82]

John Bingham, who later wrote section one of the Fourteenth Amendment, had been an endorser of the book and, as many Southerners saw it, he was a felon who should be hung. In 1866, three of the seven Republican members of the Joint Committee that framed the Fourteenth Amendment (including Bingham) had endorsed the book. So had the Republican speaker of the House of Representatives.[83] When Bingham and others said the Fourteenth Amendment was needed to protect free speech, people at the time knew what they meant.

D. Anti-war Speech during the Civil War

In 1863, during some of the darkest days of the Civil War, Union General Ambrose Burnside arrested Ohio Democratic politician Clement Vallandigham for making an anti-war political speech. Burnside was in command of the military district that included Ohio. Ohio was not a battleground. Burnside had previously issued General Order 38: "The habit of declaring sympathies for the enemy will not be allowed in this Department. Persons committing such offenses will be at once arrested. . . . [T]reason, express or implied, will not be tolerated in this Department."[84]

Vallandigham was a racist and a critic of the war. Still, he had been careful in his public statements to urge obedience to the law and the draft, and to suggest that redress must be sought at the polls. He attacked General Order Number 38. He insisted that his right to free speech did not depend on permission from General Burnside. It came from "General Order Number 1," the

[81] *Id*. at 1152-53.

[82] *Id*. at 1174.

[83] *Id*. at 1174, n. 351.

[84] *Ex parte* Vallandigham, 68 U.S. 243, 244 (1863).

Constitution.

> The charge on which the military tribunal tried Vallandigham reads as follows: [T]hat the said Clement L. Vallandigham, a citizen of the State of Ohio, on or about the first day of May, 1863, at Mount Vernon, Knox County, Ohio, did publicly address a large meeting of citizens, and did utter sentiments in words, or in effect, as follows, declaring the present war "a wicked, cruel, and unnecessary war;" "a war not being waged for the preservation of the Union;" "a war for the purpose of crushing out liberty and erecting a despotism;" "a war for the freedom of the blacks and the enslavement of the whites;" stating "that if the Administration had so wished, the war could have been honorably terminated months ago;" that "peace might have been honorably obtained by listening to the proposed intermediation of France;" . . . [C]harging that "the Government of the United States was about to appoint military marshals in every district, to restrain the people of their liberties, to deprive them of their rights and privileges;" characterizing General Order No. 38 from Head-quarters Department of the Ohio, as a "base usurpation of arbitrary authority," inviting his hearers to resist the same, by saying, "the sooner the people inform the minions of usurped power that they will not submit to such restrictions upon their liberties, the better;". . . . All of which opinions and sentiments he well knew did aid, comfort, and encourage those in arms against the Government, and could but induce in his hearers a distrust of their own Government, sympathy for those in arms against it, and a disposition to resist the laws of the land.[85]

Burnside tried Vallandigham before his hand-picked military commission. Not surprisingly, the commission convicted and sentenced him to prison and hard labor. Significantly, this was a military trial of a civilian, outside the area of military conflict, where the civil courts were functioning. The offense was making a political speech opposing the war policy of the administration, while urging obedience to the laws and redress at the polls. Lincoln changed Vallandigham's sentence to exile to the Confederacy.[86]

Soon Burnside struck again. This time he seized the *Chicago Times* newspaper and prohibited further publication–ignoring a temporary restraining order from a federal judge. This

[85] *Id*. at 244. For the story, see CURTIS, FREE SPEECH, THE PEOPLE'S DARLING PRIVILEGE, *supra* note 3, chs. 14 & 15. On the peace question, see WILLIAM HARLAN HALE, HORACE GREELEY: VOICE OF THE PEOPLE (1950).

[86] Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105, 117-31 (1998) [hereinafter Curtis, *Vallandigham*].

time Lincoln overruled his General.[87]

Both of Burnside's actions produced substantial public protest. The protest came not only from pro- and anti-war Democrats, but from a number of Republicans and abolitionists. Public resolutions insisted that free speech was a "home bred right, a fireside privilege." Democrats insisted that men called on to fight and die must have the right to discuss the wisdom of the war and how it should be carried out. The massive public protest seems to have induced Lincoln privately to rein in his generals. Yet, while he privately instructed generals to avoid such tactics, Lincoln publicly defended the military arrest of Vallandigham and, indeed, the arrest of anyone who remained silent upon hearing such disloyal sentiments expressed.[88]

This time it was the Democrats who appealed to popular sovereignty and freedom of speech and press, as well as to constitutional safeguards such as jury trial and grand jury indictment. Significantly, Democrats also described these fundamental rights as constitutional privileges or immunities of American citizens.[89] The Democratic protests were supported by many Republicans and abolitionists.

When Congressman Long from Ohio introduced a resolution in 1863 that said the Civil War could not be won without undue suffering and urged that the South be allowed to go in peace, the Republicans in Congress introduced a resolution for his expulsion. But leading Republican newspapers joined Democrats in criticizing the attempted expulsion as a violation of republican government and free speech, and the attempt to expel Long was withdrawn and replaced with a censure motion.[90]

E. Where the Defense of Free Speech Comes From

From the Sedition Act through the Civil War, free speech received little protection from

[87] *Id*. at 132-35.

[88] *Id*. at 137-52.

[89] *Id*. *See also id*. at 143-47; 135; 138.

[90] *Id*. at 164-70.

the courts. Courts upheld an act that made it a crime to utter "false" opinions about an incumbent president, but not about his challenger.[91] Southern state courts upheld statutes that made it criminal for one voter to criticize the institution of slavery to another.[92] When a union general in the state of Ohio arrested a Democratic politician for urging people to obey the laws but to repudiate the war policy of the administration at the polls, a federal judge refused to issue a writ of habeas corpus. There was, he suggested, too much of the pestilential leaven of disloyalty abroad in the land.[93]

While the judges did little to protect free speech, citizens, politicians, and activists did much more. They insisted on the right to criticize public men and public measures – to discuss all political, moral, and social questions on every inch of American soil. Crucial constitutional decisions were made outside of the courts– in Northern legislatures that refused to suppress anti-slavery speech and in the "court of public opinion." The right to engage in robust and wide-open discussion of public affairs that was protected in *New York Times Co. v. Sullivan*[94] had its antecedents in the free speech struggles before and during the Civil War. Perhaps the popular defense of free speech and the passive or negative role of the courts should not be too surprising. Courts are, in many ways, lagging indicators.

During Reconstruction, the story of suppression of anti-slavery speech in the South was re-enacted in a new setting. Terrorist bands attacked and intimidated African-American voters and their Republican allies. The United States Supreme Court made it quite difficult for the national government to suppress politically motivated private– as opposed to governmental– violence in the Southern states that was aimed at suppressing Republican speech and

[91] United States v. Lyon, 15 F. Cas. 1183 (C.C.D. Vt. 1,798) (No. 8646); United States v. Cooper, 25 F. Cas. 631 (C.C.D. Pa. 1800) (No. 14,865).

[92] State v. Worth, 52 N.C. 488 (1860).

[93] Curtis, *Vallandigham*, *supra* note 86, at 130-31.

[94] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

association.[95] In the 1890s, tactics of violence and intimidation were also used against Southern populists as well as against Republicans.[96] In spite of the guarantees of the Fifteenth Amendment (and even ignoring section two of the Fourteenth Amendment), African-Americans were deprived of the right to vote in large parts of the South.[97]

For much of American history, there was neither democracy nor free speech on issues of race and on many basic economic issues in much of the South. Since the nation now counted disfranchised Southern Americans of African descent for purposes of representation, it swelled the political power of the Southern states, a power that was used again and again to thwart progressive change.

Proponents of free speech insisted that free speech was indivisible. As they saw it, attacks on the free speech rights of even the despised abolitionists threatened the free speech rights of all. Many abolitionists and Republicans, in turn, defended the free speech rights of racists such as Vallandigham and the *Chicago Times*. They warned that establishing a principle to suppress racist reactionaries today could be turned against advocates of progress tomorrow. Ideas that government may not ordain an orthodoxy, must be ideologically neutral in its regulations of speech, and the rejection of the bad tendency approach stretch back at least to the debates over the Sedition Act and anti-slavery speech.[98]

The federal system had both protected and suppressed speech. It protected it in the North and allowed its suppression in the South.

V. FREE SPEECH HISTORY AND CONSTITUTIONAL MEANING

Those who deny that the Fourteenth Amendment should be read to protect *any* rights in

[95] United States v. Cruikshank, 92 U.S. 542 (1875); United States v. Harris, 106 U.S. 629 (1883).

[96] *E.g.*, JEFFREY J. CROW & ROBERT F. DURDEN, MAVERICK REPUBLICAN IN THE OLD NORTH STATE: A POLITICAL BIOGRAPHY OF DANIEL L. RUSSELL 138-59 (1977); PAUL ESCOTT, MANY EXCELLENT PEOPLE: POWER AND PRIVILEGE IN NORTH CAROLINA 1850-1900 241-67 (1985).

[97] *E.g.*, VERNON L. WHARTON, THE NEGRO IN MISSISSIPPI 1865-1890 (1965); TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63 485-515; 636; 720-23 (1988).

[98] Curtis, *Vallandigham*, *supra* note 86, at 184-87; 189-90; Curtis, *Curious History*, *supra* note 58, at 859-70.

the Bill of Rights from state abridgment–not even free speech, press, religion, and assembly– are forced to ignore the lessons of this history as it bears on original intent, original meaning, and the historical context in which the Fourteenth Amendment was proposed. In theory, our nation is founded on popular sovereignty, and the Constitution is legitimated as an expression of the will of "We the People." As a result, attempts to find original understanding simply in ancient court decisions and musty treatises is not adequate. Constitutional law limited to these sources leaves out crucial parts of the story. A much larger group of people–men and women, black and white– were crucial constitutional actors. Those who search the past for the meaning of free speech should also explore the complex question of how this privilege and immunity of American citizens was understood in 1866 to1868. In a nation founded on popular sovereignty, popular understanding of the meaning of a constitutional amendment should count.

Casebooks have been caught in a time warp. Most were designed to teach the current version of the law and, to a lesser extent, to present some cases that illustrate an earlier judicial approach. Casebooks typically emphasize precedent and doctrinal analysis. Some modern casebooks also provide very extensive commentary on what law professors think about the current state of the law. Crucial constitutional events that do not produce Supreme Court cases rarely appear in most casebooks. Original intent – or original meaning – has never been more than one of the many important factors in shaping the law, so casebooks' attention to the history implicated by ideas of original understanding has been episodic.

While casebooks were teaching precedent and doctrine, a number of influential judges and legal thinkers were writing manifestos for a judicial revolution. In their view, original intent or original meaning – based on *their* understanding of the historical record– is the true key to interpreting the Constitution. Taken to its logical extreme–although, perhaps, few are willing to press it that far–the manifesto might begin: "Strict constructionists unite! You have nothing to lose but your New Deal era and Warren Court precedents!" My own view is that history and original meaning are important factors in constitutional analysis, but they are only factors. Other factors to consider include the text and structure of the Constitution, precedent, and ethical

aspirations. We must also consider how our changed background understanding of issues such as race and gender must affect the application of the principles the Framers embraced. The same is true for changes in society, such as the development of an integrated national market and for technological changes such as wiretapping.

In a nation based on popular sovereignty, the original common understanding of a constitutional provision or of an amendment should at least be that of the politically active people at the time of enactment. Skeptics may doubt that such an understanding can be found and many, including myself, doubt that it can be the only factor to consider. But one thing is certain, as the case of free speech shows: if we want to have a full picture of this constitutional animal–and a full understanding of how the Constitution works and what sustains our liberties–these questions cannot be adequately answered based on the incomplete fossil record gathered in casebooks that were designed to serve very different purposes.

VI. CONCLUSION

There are good reasons to teach constitutional law as it is taught. Most cases are decided based on factors other than history. The justification most often cited is precedent. So a wholesale revision would hardly be in order. But if we want students to better understand free speech and the incorporation doctrine that makes it a national right, we can tell them about some of the stories I have described. These stories illuminate the meaning of free speech in a democracy. Students of constitutional law benefit from at least a brief discussion of the Sedition Act and the arguments for and against it, and some books now provide it. They would also benefit from learning about some of the episodes in the effort to suppress anti-slavery *and* Republican speech, about the free speech ideas that were mobilized for and against suppression, and how this history relates to application to the states of the free speech, press, petition, and religion guarantees through the Fourteenth Amendment.

Lawyers are, among other things, people who make arguments. The larger context of the Fourteenth Amendment is one good way to teach about arguments from text (both the immediate words and how they echo other parts of the Constitutional text), history, precedent, original

meaning, structure, and ethical aspirations.[99] History, as well as precedent, can provide paradigm cases.[100] To understand the meaning of the guarantees of free speech, a single pertinent story may provide a deeper understanding than several cases. Historical episodes can help to explain reasons for constitutional protections in a uniquely powerful way. History has other important functions: it shows how constitutional law is made outside of courts, and it underlines the lesson that, in the final analysis, liberty depends on the understanding and support of a free people. Many of these stories are inspiring stories in which ordinary and extraordinary people were standing up and protecting constitutional liberties for others, even though the courts were doing a miserable job of protecting these liberties.

Of course, change implies loss as well as gain. If we have more stories from free speech history, we will have less room for cases and doctrine. But history can provide lawyers and students with meaning and context, and locate their efforts in the larger context of our nation's history. For individuals, for families, and for nations, the stories we tell about our past are important ways of understanding our identity.[101] History locates us in the concentric circles of family, community, and nation. Connection to the past adds meaning to the present. For individuals and nations, the best understanding comes from looking at the bleaker – as well as the brighter – side of our natures.

Sadly, over the long haul of American history, judges have often done a poor job of protecting the constitutional rights of the poor and oppressed. Pennsylvania, like many Northern states, had abolished slavery and had a number of free blacks. These had long sought protection against kidnaping and being hauled into slavery. The legislature of Pennsylvania attempted to supply such protection by requiring a judicial determination of whether black people were slaves or free before they were removed from Pennsylvania for purposes of enslaving them. In *Prigg v.*

[99] For an illuminating application of these methods, see AMAR, *supra* note 8.

[100] For an eloquent example, see POWE, *supra* note 19, at 1-7 (providing an account of the *Patterson* case).

[101] JEROME BRUNER, ACTS OF MEANING (1990); *see also* SAM KEEN, TO A DANCING GOD 83-105 (1970) (providing another discussion of story-telling).

Pennsylvania,[102] the United States Supreme Court voided a Pennsylvania state law that required a judicial determination before a person was removed from the state as a slave. The Court held that slave owners had a constitutional right to seize *alleged* slaves in free states and take them back to a slave state without any judicial process at all. This was so even though, in free states, all people were presumed free; in slave states, mere color gave rise to a presumption of slavery. As the court saw it, any delay in the right of the alleged slave owner, including the delay required for a due process hearing, was intolerable. So slaveowners could capture and remove alleged slaves with no process at all.[103]

Dred Scott held that free Americans descended from slaves had no rights that a white man was bound to respect– no federal Constitutional rights at all.[104] During and after Reconstruction, the Court went a long way toward holding that Congress lacked the power to protect American citizens from violence designed to punish them for free speech and for their political allegiances.[105] In the *Lochner* era, courts too often interpreted constitutional guarantees to protect concentrated economic power from the democratic process.[106] The role of the courts in early free speech history is also often disappointing.

Understanding the broader context of American constitutional history holds a final important lesson: courts can be important guardians of liberty, but they have often failed to uphold their trust. Constitutional liberty is too important a matter to be left exclusively to the judges. We need redundant safety devices. The ship of liberty requires lifeboats as well as a double hull;[107] it requires popular support as well as protective precedent.

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[102] Prigg v. Pennsylvania, 41 U.S. 539 (1842).

[103] *Id*. at 547-49.

[104] Dred Scott v. Sandford, 60 U.S. 393 (1856).

[105] United States v. Cruikshank, 92 U.S. 542 (1875).

[106] Lochner v. New York, 198 U.S. 45 (1905).

[107] The metaphor comes from Randy E. Barnett, *Reconceiving the Ninth Amendment*, 74 CORNELL L. REV. 1, 23-34 (1988).

There is a natural tendency to think that the views and efforts of ordinary citizens do not matter. As these stories show, that is a profound mistake. If we want our students to understand our full heritage of liberty, how each generation must struggle for it anew, and how many ordinary Americans have contributed to it, then we might teach about constitutional actors outside the courts – about the men and women, black and white, abolitionists, anti-slavery activists, Populists, Progressives, and others who fought to make the United States the land the Declaration of Independence, the preamble to the Constitution, and the Pledge of Allegiance promise: a land of "liberty and justice for all."